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Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-935-1994
KAMALANATHAN RATNAM JC
B 13 NOVEMBER 1995

Civil Procedure *— Appeal — Absence of defendants' counsel — Order allowing appeal made in absence of defendants' counsel after submissions by plaintiffs' counsel — Whether order ought to be set aside or appealed against — Rules of the High Court 1980 O 32 r 6 & O 56 r 1*

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Civil Procedure *— Judgments and orders — Appeal to judge in chambers — Absence of defendants' counsel — Order allowing appeal made in absence of defendants' counsel after submissions by plaintiffs' counsel — Whether order ought to be set aside or appealed against — Rules of the High Court 1980 O 32 r 6 & O 56 r 1*

D ***Civil Procedure*** *— Judgments and orders — Setting aside, application for — Failure of counsel to enter hearing date in diary — Whether sufficient ground to show merits in application*

The plaintiffs sued the defendants for the recovery of certain sums of money owed to them by the defendants. The defendants filed an
E application to set aside the issue and service of the writ and claim. This application was allowed by the registrar on 28 November 1994. The plaintiffs appealed to the judge in chambers against the decision of the registrar. At the hearing of the plaintiffs' appeal on 21 June 1995, the plaintiffs' counsel was present but neither the defendants
F nor their counsel was present. Upon the plaintiffs' request to proceed with the matter, the court heard their submission and reserved judgment to 10 July 1995. On 10 July 1995, in the presence of both the plaintiffs' and the defendants' counsel, the court ordered that the plaintiffs' appeal be allowed in the absence of the defendants and their counsel ('the order'). This is the first defendants' application to
G set aside the order of 10 July 1995. The first defendants contended that the order was an ex parte order which could be set aside under O 32 r 6 of the Rules of the High Court 1980 ('the RHC'). The issue before the court was whether the order made on appeal under O 56 r 1 of the RHC ought to be set aside or appealed against.

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Held, dismissing the first defendants' application:

(1) Only in such circumstances where there are specific provisions made for the setting aside of an order or judgment can the party applying to set aside make his application to the court. If there is no such provision, then the remedy for the aggrieved party is to
I appeal. Order 56 r 2 of the RHC explicitly provides that a party may appeal against any judgment, order or decision made by a judge in chambers. There is, however, no provision for setting aside a judgment, order or decision made on an appeal (see pp 61I, 62A).

(2) The provisions of O 32 of the RHC will apply unless there are specific rules elsewhere that expressly or even impliedly do away

with such application. Applying the ejusdem generis principle and looking at O 32 r 13 of the RHC, O 32 r 11 is applicable at the originating process stage and not at the appellate stage. The word 'appeal' in O 32 r 11(1) provides for cases where there are specific provisions for appeals to be sought by way of summons in chambers (see pp 62D–63C); *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, *Attorney General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49, *Canada Sugar Refining Co Ltd v R* [1898] AC 735 and *Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465 followed.

(3) There is a clear distinction between an application to reinstate a case which was struck out without it being heard and one which was disposed of after it was heard (see p 64B); *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73 and *Hession v Jones* [1914] 2 KB 421 followed. The first defendants could not avail themselves of O 32 r 6 of the RHC and there ought to be an appeal filed under O 56 r 2 with leave to the Court of Appeal (see p 64E).

(4) Counsel's failure to enter the hearing date in her diary was insufficient ground to satisfy the court that there were merits to the application (see p 64G); *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 and *Tong Lee Hua & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257 followed.

Per curiam:

The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rules of court. The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil itself, properly and effectively, as a court of law to do justice between the parties and to secure a fair trial between them. Its overriding feature is that it is a part of procedural law, both civil and criminal, and not a part of substantive law. It must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court (see pp 60I–61B); *Willis v Earl Beauchamp* (1886) 11 PD 59, *Connelly v Director of Public Prosecutions* [1964] AC 1254 and *The Venus Destiny* [1980] 1 All ER 718 followed.

[Bahasa Malaysia summary

Plaintif telah membawa tindakan terhadap defendan-defendan untuk mendapat balik jumlah-jumlah wang tertentu yang terhutang kepada mereka oleh defendan-defendan. Defendan-defendan telah memfailkan permohonan untuk mengetepikan pengeluaran serta penyampaian writ dan tuntutan. Permohonan ini telah dibenarkan oleh pendaftar pada 28 November 1994. Plaintif telah merayu kepada hakim dalam kamar terhadap keputusan pendaftar itu. Di pembicaraan rayuan plaintif pada 21 Jun 1995, peguam plaintif hadir tetapi defendan-defendan mahupun peguam mereka tidak hadir. Di atas

permintaan plaintif untuk meneruskan dengan pembicaraan, mahkamah telah mendengar hujahan plaintif dan merizabkan penghakiman kepada 10 Julai 1995. Pada 10 Julai 1995, dalam kehadiran kedua-dua peguam bagi pihak plaintif dan defendan-defendan, mahkamah telah memerintahkan bahawa rayuan plaintif dibenarkan dalam ketidakhadiran defendan-defendan serta peguam mereka ('perintah itu'). Ini adalah permohonan defendan pertama untuk mengetepikan perintah itu yang bertarikh 10 Julai 1995. Defendan pertama menegaskan bahawa perintah itu adalah perintah ex parte yang boleh diketepikan di bawah A 32 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Isu di hadapan mahkamah adalah sama ada perintah itu yang dibuat atas rayuan di bawah A 56 k 1 KMT patut diketepikan atau dicabar melalui rayuan.

Diputuskan, menolak permohonan defendan pertama:

(1) Pihak yang memohon untuk mengetepikan boleh membuat permohonannya ke mahkamah hanya di dalam hal-hal keadaan di mana terdapat peruntukan-peruntukan spesifik dibuat untuk pengetepian sesuatu perintah atau penghakiman. Jika tidak terdapat peruntukan sedemikian, maka remedi pihak terkilan adalah untuk merayu. Aturan 56 k 2 KMT memperuntukkan secara jelas bahawa sesuatu pihak boleh merayu terhadap apa-apa penghakiman, perintah atau keputusan yang dibuat oleh hakim dalam kamar. Namun demikian tidak terdapat peruntukan untuk mengetepikan suatu penghakiman, perintah atau keputusan yang dibuat atas rayuan (lihat ms 61I, 62A).

(2) Peruntukan-peruntukan A 32 KMT akan terpakai kecuali jika terdapat kaedah-kaedah spesifik lain yang secara nyata atau tersirat menghapuskan pemakaian sedemikian. Menggunakan prinsip 'ejusdem generis' dan memandangkan A 32 k 13 KMT, A 32 k 11 adalah terpakai di peringkat proses pemula dan bukan di peringkat rayuan. Perkataan 'rayuan' di dalam A 32 k 11(1) adalah peruntukan untuk kes-kes di mana terdapat peruntukan-peruntukan spesifik untuk rayuan dibuat melalui saman dalam kamar (lihat ms 62D–63C); *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, *Attorney General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49, *Canada Sugar Refining Co Ltd v R* [1898] AC 735 dan *Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465 diikut.

(3) Terdapat perbezaan yang jelas di antara suatu permohonan untuk menghidupkan semula kes yang telah dibatalkan tanpa didengar dan kes yang diselesaikan setelah ianya didengar (lihat ms 64B); *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73 dan *Hession v Jones* [1914] 2 KB 421 diikut. Defendan pertama tidak boleh menggunakan A 32 k 6 KMT dan suatu rayuan sepatutnya difailkan di bawah A 56 k 2 dengan kebenaran kepada Mahkamah Rayuan (lihat ms 64E).

(4) Kegagalan peguambela untuk memasukkan tarikh pembicaraan ke dalam diarinya adalah alasan yang tidak memadai untuk

memuaskan mahkamah bahawa terdapat merit dalam permohonan ini (lihat ms 64G); *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 dan *Tong Lee Hua & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257 diikut.

Per curiam:

Terma 'bidang kuasa sedia ada' tidak digunakan sebagai perbezaan daripada bidang kuasa mahkamah yang dijalankan mengikut 'common law' atau diberikan kepadanya oleh statut atau kaedah-kaedah mahkamah, kerana mahkamah boleh menjalankan bidang kuasa sedia adanya biarpun berkenaan dengan perkara-perkara yang dikawal oleh statut atau kaedah-kaedah mahkamah. Bidang kuasa mahkamah yang terkandaung di dalam terma 'sedia ada' adalah kuasa yang membolehkannya memenuhi tugasnya, secara patut dan berkesan, sebagai sebuah mahkamah undang-undang untuk menlaksanakan keadilan di antara pihak-pihak dan untuk mengadakan suatu perbicaraan yang saksama di antara mereka. Sifat utamanya adalah ianya merupakan sebahagian undang-undang prosedur, kedua-dua sivil dan jenayah, dan bukan sebahagian undang-undang substantif. Ia mesti dibezakan daripada perlaksanaan budi bicara kehakiman; dan ia boleh dilaksanakan biarpun di dalam hal keadaan yang dikawal oleh kaedah-kaedah mahkamah (lihat ms 60I–61B); *Willis v Earl Beauchamp* (1886) 11 PD 59, *Connelly v Director of Public Prosecutions* [1964] AC 1254 dan *The Venus Destiny* [1980] 1 All ER 718 diikut.]

[*Editorial Note*: The first defendant has appealed to the Court of Appeal vide Civil Appeal No W–02–725–95.]

Notes

For cases on setting aside an ex parte order, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2060–2061.

Cases referred to

Attorney General v HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49
Boyle v Sacker (1888) 39 Ch D 249
Canada Sugar Refining Co Ltd v R [1898] AC 735
Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58
Connelly v Director of Public Prosecutions [1964] AC 1254
First Consolidated Sdn Bhd v Padu Ehsan Sdn Bhd (Majlis Perbadanan Melaka Bandaraya Bersejarah, Garnishee) [1994] 3 AMR 2578
Grove, Re (1888) 4 TLR 272
Hession v Jones [1914] 2 KB 421
KI Muhiudeen Rawther v KEP Abdul Kassim & Ors [1959] MLJ 257
Kandasamy all Sreenivasagam v Syarikat Muzwina Development Sdn Bhd [1990] 1 MLJ 15
Krishnadas & Ors v Maniyam [1993] 3 MLJ 465
Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445
Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph [1993] 2 MLJ 57

Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178
Tan Weng Chiang v PP [1992] 2 MLJ 625
Tong Lee Hwa & Anor v Malayan Banking Bhd [1978] 1 MLJ 257
Venus Destiny, The [1980] 1 All ER 718
Vint v Hudspith (1885) 29 Ch D 322
WEA Records Ltd v Visions Channel 4 Ltd & Ors [1983] 2 All ER 589
Willis v Earl Beauchamp (1886) 11 PD 59

Legislation referred to

Courts of Judicature Act 1964 s 25
Federal Constitution art 121(1), (1A)
Rules of the High Court 1980 O 32 rr 6, 11(1), 13, O 42 r 13, O 56 rr 1, 2, O 92 r 4

Maidzuara Mohammed (*Shearn Delamore & Co*) for the applicants/defendants.
CL Chin (*Syarikat Radhakrishnan*) for the respondents/plaintiffs.

Cur Adv Vult

Kamalanathan Ratnam JC: This was an application by the first defendants for leave to file this application out of time and for a prayer that the order dated 10 July 1995 given by Abdul Malek J upon the hearing of an appeal from the senior assistant registrar in the absence of the first defendants or their solicitors, be set aside and for the usual other consequential reliefs.

The first defendants were the producers of motor truck shows known as the Big Foot Truck Shows ('the shows'). The second and third defendants were directors of the first defendants. The plaintiffs, a locally incorporated company were desirous of bringing the shows to the Malaysian public and they signed an agreement with the first defendants on 9 July 1994 for various road shows in Malaysia ('the said agreement'). The shows were a success.

The plaintiffs alleged that when the defendants were asked to produce the expense accounts in order to work out the plaintiffs' profits, they refused to do so.

In the circumstances, the plaintiffs proceeded to work out their own estimated profits and having reached a figure of RM954,750, demanded their half share of RM477,375 pursuant to the said agreement. Since a sum of RM300,000 had already been paid to the plaintiffs by the defendants, the plaintiffs sought recovery of the balance sum of RM177,375.

As the plaintiffs were no longer involved in the production of the said shows, the first defendants had to terminate their shows as they were without permits.

The plaintiffs also contended that in addition to the sum of RM177,375 due to them, the defendants owed a further sum of RM316,463.36 as tax. They also sought vide their writ, various injunctive orders and costs.

The plaintiffs vide an ex parte order dated 8 November 1994 obtained the various injunctive orders. As the said order is not relevant to the present application, I shall not deal with the same any further.

The first defendants then filed an application for leave to enter conditional appearance contending that since all three defendants were foreigners, the plaintiffs had failed to comply with O 6 r 6(1) of the Rules of the High Court 1980 ('RHC').

The defendants filed a further application to set aside or vary the order granting the plaintiffs various injunctive orders. The said order was varied on terms by Abdul Malek J in chambers.

In the meantime, the defendants filed a fresh application to set aside the issue and service of the writ and claim dated 8 November 1994 on the grounds that the first defendants are registered in the United Kingdom. Since there was non-compliance with O 6 r 6(1) and O 11 of the RHC, the first defendants sought to move the court accordingly. The deputy registrar who heard the application allowed the first defendants' prayers to set aside the issue and service of the writ on 28 November 1994. The plaintiffs appealed against the said decision, which appeal is encl 40.

Enclosure 40 came up for hearing before Abdul Malek J on 21 June 1995. The appellants' counsel was present but neither the respondents nor their counsel was present. Since the appellants requested the matter to proceed, the court heard their submission and reserved judgment to 10 July 1995.

On 10 July 1995 both the appellants' counsel and the respondents' counsel were present and the court made the following order:

> Mahkamah telah meneliti perkara ini dan berpendapat bahawa rayuan hendaklah dibenarkan dengan kos tanpa kehadiran defendan [pertama] dan peguamnya.

It is against that order that the first defendants make the present application.

Whether an ex parte order of a judge made on an appeal ought to be set aside or appealed against

The appellants/first defendants contend that the order made by Abdul Malek J on 10 July 1995 was an ex parte order and that this was clear from reading the order of the judge itself. They argued that although the judge had made the order, it had as yet not been extracted and Mr Chin, counsel for the respondents, confirmed that the order had indeed not been extracted.

Cik Maidzuara for the applicants referred to *Boyle v Sacker* (1888) 39 Ch D 249. This case considered an order made in the absence of a party and it raises the three issues which had arisen in this case, ie:

(a) whether an order being made wherein the opposing party had not had an opportunity of being heard is an ex parte order;

(b) that if it is an ex parte order, then the applicants have to apply to set it aside, ie to discharge the order;

(c) that [the application] can be made either to the same judge or to a judge who is now hearing the matter.

Cotton LJ said at p 251:

> ... discharging an order is not the same thing as reversing or varying an order, it does not go on the ground that there has been an erroneous decision, but on the ground that the opposing party has not had an opportunity of being heard. I am, therefore, of opinion, that an application of this court, not being an appeal from the court to which the application ought to have been made, is irregular.

I was also referred to *WEA Records Ltd v Visions Channel 4 Ltd & Ors* [1983] 2 All ER 589 at p 593 wherein Donaldson MR said:

> As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
>
> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see RSC O 35 r 2 ...

In *Vint v Hudspith* (1885) 29 Ch D 322, the action was set for hearing and since the plaintiffs failed to appear, the action was dismissed with costs. Against this the plaintiffs appealed to the Court of Appeal.

Cotton LJ was of the opinion that the plaintiffs' proper course was to apply to the judge to restore the cause on the ground that the plaintiff was absent per incuriam. Whilst he held that the appellate court can entertain an appeal from a judgment by default, in a case like this, he said:

> ... to prevent the Court of Appeal from being flooded by having to hear cases in the first instance, it is therefore right that the plaintiff should first apply to the judge who gave the judgment to restore the action.

Counsel for the applicants herein drew a distinction between *Vint*'s case which was a case fixed for trial and *Re Grove* (1888) 4 TLR 272, where an order to cross-examine a respondent on his affidavit was made. On appeal to the divisional court the respondent in whose favour the order was earlier made, failed to attend and the divisional court discharged the order. The respondent appealed to the Court of Appeal which held that though the course pointed out in *Vint v Hudspith* (1885) 29 Ch D 322 of applying to the court below for a rehearing was the proper course, still the Court of Appeal had jurisdiction to hear the appeal, the case of a respondent not appearing in the court below being very different from an appellant not appearing there.

I am informed by both counsel that their research has not led them to find a case of a similar nature, where on an appeal to a judge in chambers under O 56 r 1 of the RHC, when one party fails to attend, whether the defaulting party can rely on the provisions of O 32 r 6.

In *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, VC George J (as his Lordship then was) reviewed the position of an inter partes application where the defendant is absent though duly served. He said, at p 445:

> Now, a strong quorum of the Singapore Court of Appeal had held in *United Overseas Bank Ltd v Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 at p 87 that where the defendant though served fails to appear, the order made in an inter partes application is an ex parte order:
>
> > 'The first question for consideration is whether or not the order made on the originating summons was an ex parte order and comes within O LIII r 4(1).
> >
> > The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case O LI r 16 provides:
> >
> > > "Where any party who had been duly served fails to attend at the time appointed for the hearing, the judge may proceed ex parte, if he thinks it expedient to do so and may require such evidence of service as he thinks fit."
> >
> > It is clear then that a judge may proceed ex parte to hear an application where a party duly served fails to appear at the time appointed for the hearing.
> >
> > An application so heard in the absence of a party is not an ex parte application. It is the hearing which is ex parte and an order made on such a hearing is an ex parte order within the terms of O LIII r 4(1).'
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> This dictum was considered and applied by Edgar Joseph Jr J in *UMBC Bhd v Syarikat Perumahan Lunas Sdn Bhd* 1 [1988] 1 MLJ 546 at p 547. What is relevant for the purposes of the instant case is the ratio decidendi that resulted in the Singapore Court of Appeal in the former and Edgar Joseph Jr J in the latter case holding that in an inter partes application, where the defendant is absent though he had been duly served, the court may proceed to hear the matter and that while the application so heard is not an ex parte application, the hearing in the absence of the defendant is an ex parte hearing and the order made on such a hearing is an ex parte order. Applying that ratio to the instant case, it cannot but be held that the order made on 13 April 1988 was an ex parte order made in chambers.
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> Now the application in the instant case that resulted in the making of the order nisi and on its further consideration in the said order being made absolute was a summons to be proceeded with in chambers. Order 32 sets out the rules for 'Applications and Proceedings in Chambers'. These rules in O 32 have general application to applications and proceedings in chambers unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application.

His Lordship was quick to hold that O 32 provides for general application unless there are specific rules elsewhere that expressly or even implicitly do away with the said rules of general application. I shall come back to this little egress provided by his Lordship, later.

Finally, the applicants seek this court's inherent power to invoke O 92 r 4 of the RHC to prevent injustice and to allow the application to set aside the order made by Abdul Malek J on 10 July 1995. Counsel relied on *First Consolidated Sdn Bhd v Padu Ehsan Sdn Bhd (Majlis Perbadanan Melaka Bandaraya Bersejarah, Garnishee)* [1994] 3 AMR 2578 at p 2581.

Mr Chin in his submission argued that under O 56 r 2 of the RHC, an appeal is to a superior court, ie from the deputy registrar to the judge in chambers. He also argued that O 55, which relates to appeals from the subordinate courts, makes no provision for the setting aside of an order made upon an appeal. He argued with force that if a party seeks the court to exercise its inherent jurisdiction, then the court can only do so on established principles, otherwise there would be uncertainty in the administration of justice.

Both parties conceded that they were unable to find an authority where the court has exercised its discretion and set aside an order made on an appeal.

It would seem that whilst the applicants' counsel asked the court to rely on O 92 r 4 and to apply the court's inherent *powers*, the respondents were submitting on the court's inherent *jurisdiction*.

Is there a difference between the inherent jurisdiction and the inherent powers of the court?

Clearly there lies a distinction between the exercise of jurisdiction and the exercise of power. The word jurisdiction has its origin from the Latin, *jurisdictio*, ie to where the dictates of the law would apply.

Article 121(1) of the Federal Constitution sets out the jurisdiction and powers of the inferior and High Courts:

> 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—
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> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
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> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The parent authority that confers jurisdiction on the High Court to hear matters, further devolved such jurisdictional authority to a federal law, namely, the Courts of Judicature Act 1964 ('the CJA') which, to quote William Shakespeare, '*cabin'd and cribb'd*' the criminal and civil jurisdictions of the High Court. The High Court cannot act beyond the scope of the provisions of the CJA.

Article 121(1A) clearly spells out that the High Court has no jurisdiction over matters which are properly cognizable in the Syariah Court.

As to the powers to be exercised by the High Court, again such powers as can be exercised by the High Court must also be conferred upon it by or under a federal law (see art 121(1)). Power is authority. Again s 25 of the CJA spells out the power that the High Court can exercise:

> 25 Powers of the High Court
>
> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Thus it is plain and obvious that only where there is jurisdiction will there be conferred the power to act.

An illustration of this is the case of *Kandasamy a/l Sreenivasgam v Syarikat Muzwina Development Sdn Bhd* [1990] 1 MLJ 15. In this case the plaintiff had agreed to purchase a piece of property from the defendants and part-payment had been made; the plaintiff retained a certain sum claiming a right of set-off. Vacant possession was to be delivered to the plaintiff within 24 months of the agreement, failing which there was a claim for immediate payment of liquidated damages calculated from day to day at 10% of the purchase price. The plaintiff applied for summary judgment, contending that his claim was for vacant possession and liquidated damages.

When the hearing of the application for summary judgment came up before the senior assistant registrar, the defence argued that the registrar had no jurisdiction to decide the matter as it involved specific performance for the sale and purchase of property. Despite the plaintiff's submission that theirs was only an application for vacant possession, the registrar agreed with the defence.

When the case came up for hearing before Abdul Malek J, his Lordship held that since O 1 r 4(2) of the RHC provides that 'Court' means the High Court or any one or more judges thereof, whether sitting in court or in chambers or the registrar and as applications for specific performance of an agreement fall under O 81 of the RHC, when the word 'Court' is used, clearly the registrar had jurisdiction. In other words, the jurisdiction was conferred by O 1 r 4(2) and he had the power to hear under O 81 of the RHC.

The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rules of court (see *Willis v Earl Beauchamp* (1886) 11 PD 59 at p 63). The jurisdiction of the court which is comprised within the term 'inherent' is that which

A enables it to fulfil itself, properly and effectively, as a court of law (see *Connelly v Director of Public Prosecutions* [1964] AC 1254 at p 1301). The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law. It must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court.

B

It may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or C oppression, to do justice between the parties and to secure a fair trial between them (see *The Venus Destiny* [1980] 1 All ER 718).

One of the greatest judges this land has ever produced, HT Ong J (as his Lordship then was), drew a distinction between jurisdiction and power. He said in *KI Muhiudeen Rawther v KEP Abdul Kasssim & Ors* [1959] MLJ D 257at p 258:

> With the greatest respect, I think jurisdiction upon a matter in which a judge had power to adjudicate ought to be distinguished from the powers given to the judge under the Land Code. Jurisdiction and power are not terms which are synonymous and interchangeable. Support for this view E can be found in the recent unreported judgment of the Court of Appeal in *Lee Lee Cheng v Seow Peng Kwang* [[1960] MLJ 1 at p 3] where Thomson CJ, in discussing s 47 of the Courts Ordinance and the Second Sch thereto, says:
>
> > 'It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words F are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its power in matters over which by reason of their nature or by reason of extraterritoriality, G it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.'

Mr Chin further submitted that this court has no inherent jurisdiction to set aside an order made on an appeal because there are provisions in the RHC for setting aside an order of court. And where there are specific H provisions then such specific provisions should be adhered to and not be overridden by the exercise of inherent jurisdiction.

Order 42 r 13 of the RHC provides:

> 13 Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to I vary such order or judgment must make his application to the court and serve it on the party who has obtained the order or judgment within 30 days after the receipt of the order or judgment by him.

I hold that O 42 r 13 will apply where there are provisions made in the RHC for the setting aside or varying of any order or judgment. Only in such circumstances where there are specific provisions made for the setting aside of an order or judgment can the party applying to set aside make his

application to the court. If there is no such provision then the remedy for the aggrieved party is to appeal. Order 56 r 2 is explicit:

> Subject to the provisions of s 68 of the Act, a party may appeal against any judgment, order or decision made by a judge in chambers.

There is no provision for setting aside the judgment or order or decision.

I draw to mind the words of Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 at p 181:

> It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

Applicability of O 32 RHC

I had earlier in my judgment indicated that I shall revert to VC George J's (as his Lordship then was) decision in *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445. His Lordship therein had also expressly stated that the provisions of O 32 will apply unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application.

It is clear therefore that in this instant case the provisions of O 32 r 6 of the RHC cannot apply.

If it is to be argued that an order made as a result of an appeal can be set aside under the provisions of O 32 r 6, then the only reference to 'an appeal' in the said order, is to be found in r 11(1) which reads:

> 11(1) The judge in chambers may direct that any summons, application or appeal shall be heard in court or shall be adjourned into court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.

In such circumstances it is imperative to look into the cannon of construction of statutes. It is trite law that words in a statute cannot be looked at in isolation. In *Attorney General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 at p 53, Viscount Simonds said:

> For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.

Further, Lord Davey said in *Canada Sugar Refining Co Ltd v R* [1898] AC 735 at p 741:

> Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

and these expressions of law have led to the moulding of another cannon of construction, ie the ejusdem generis principle and in *Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465, Peh Swee Chin SCJ said at p 473:

> ... in considering a statute, where general words follow particular or specific words, such general words take their meaning from, and are presumed to be restricted to, the same genus as those particular or specific words, therefore the ejusdem generis rule applies.

In applying this principle to the instant case and looking at O 32 r 13, clearly this rule deals with the admission of evidence through affidavits. In other words it indicates the applicability at the originating process stage and not at the appellate stage.

However, I am of the view that the word 'appeal' as referred to in O 32 r 11(1) does make provisions for cases where there are specific provisions for appeals to be sought by way of summons in chambers. Section 26 of the Legal Profession Act 1976 (Act 166) specifically provides for an appeal to be by way of summons in chambers:

> 26 Appeal from the decision of Board to judge
>
> (1) Any person dissatisfied with any decision of the Board may apply to a judge for a review of the decision.
>
> (2) If the Board falls to determine any request within six weeks after it has been first submitted to it, the applicant may apply under this section as if the request had been determined adversely to him.
>
> (3) Every application under this section shall be made by summons in chambers on the petition of the appellant if he has filed a petition, otherwise by originating summons; the judge hearing the application may in his discretion adjourn the application into open court.
>
> (4) Every summons in chambers or originating summons, as the case may be, shall be supported by evidence on affidavit and shall be served together with the affidavit on the Board; such summons in chambers or originating summons shall not be heard before the expiry of 12 days after the date of service on the Board.

At this juncture it is appropriate to refer to the then Supreme Court decision in *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57 which held (at p 67) that:

> On general principle, where a statute regulates the exercise of a right or power, or the use of a prescribed procedure, express reference to time being made, there is a marked inclination on the part of the court to regard the relevant provision as one which must be strictly and meticulously followed out.
>
> ... ss 93–103 of the Act present a picture of a code of procedure in which time is given a place of paramount importance.

I am further guided by the stricture of Mohamed Azmi SCJ in *Tan Weng Chiang v PP* [1992] 2 MLJ 625 at p 630 wherein his Lordship said:

> Where the meaning of words in the statute is plain and unambiguous, judges should not invent fancy ambiguities.

I am not unmindful of the decision in *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73. In that case, the defendants had filed a notice of appeal against a decision of the senior assistant registrar. But when the appeal came up for hearing, the plaintiff/respondent was represented by counsel but neither the appellants/defendants nor their counsel was present. Since there was no one to prosecute the appeal, VC George J (as his Lordship then was) struck off

the appeal with costs. The defendants then sought to apply to reinstate the same appeal. His Lordship considered both the provisions of O 56 and O 32. In the course of his judgment he referred to *Hession v Jones* [1914] 2 KB 421. The facts in *Hession*'s case are similar to the present situation where the party that was absent was the respondent. The appellant was present and the appeal was heard and disposed of. VC George J (as his Lordship then was) concurred with the decision in *Hession*'s case when he said at p 76:

> *Hession v Jones* [1914] 2 KB 421 makes a clear distinction between an application to reinstate a case which was struck out without it being heard and one which was disposed of after it was heard.

In fact, Bankes J expressed his views in *Hession v Jones* [1914] 2 KB 421 at p 428 when he said, considering *Vint*'s case:

> The court there draws a pointed distinction between the case where a proceeding is struck out for non-appearance of the appellant, and this case, where, although the respondent was absent, the appellant has argued the case and satisfied the court that he was right. In my view this court has no jurisdiction to make the order it is invited to make, and this motion must be dismissed.

In the circumstances, I am of the view that the applicants/defendants cannot avail themselves of O 32 r 6. There ought to have been an appeal filed under O 56 r 2 of the RHC with leave to the Court of Appeal.

Question of merits

On the question of merits, the applicants' counsel's reason for not attending the hearing of the appeal on 21 June 1995 was because she had failed to enter the date in her diary.

In response to this, Mr Chin referred me to *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 and to *Tong Lee Hwa & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257. In both cases the mistake of a solicitor was held to be insufficient reasons for granting special leave. The applicants' reply to these two cases is that the cases related to special leave.

In my view, failure to enter the date in the diary is not sufficient enough grounds to satisfy me that there are merits.

In the circumstances, I dismiss this application with costs.

Application dismissed.

Reported by Ng Sheau Jiuan